Supreme Court, U.S.
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No. 96-804

In The

Supreme Court of the United States

October Term, 1996

NEW VALLEY CORPORATION,

Petitioner,

v.

NEW VALLEY CORPORATION SENIOR EXECUTIVE BENEFIT PLAN PARTICIPANTS, AND WALTER E. GIRARDIN, ALEXANDER J. CHISHOLM, S.E. SMISZKO, JOHN A. HUNT, ARTHUR GARMAN, GERALD P. KENT, DELMAR HARMON, ROBERT R. GARBARINI, WALTER L. ELKINS, PHILIP SCHNEIDER, J. WILLIAM HARRINGTON, JOHN A. HOLLANSWORTH, BERNARD WEITZER, JOHN W.R. POPE, JR., ROBERT M. FLANAGAN, DOUGLAS D. LLOYD, H.E. SALTER/BARBARA ORR SALTER, RICHARD L. CALLAGHAN, AND RUSSELL W. MCFALL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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STATEMENT OF CASE

Subject to the limited exceptions set forth below, Respondent adopts Petitioner's Statement of the Case.

First, the Third Circuit did not rule " . . . (ii) that Western Union should have been equitably estopped from terminating these benefits . . . " (Petition, p. 3) but, rather, held that extrinsic evidence might show that it was so estopped (Petitioner's Appendix, p. A-17 – 18).

Secondly, the opinion below did not "create participant rights that were purposefully omitted by ERISA . . . " (Petition, p. 3), *i.e.*, referring to the Court's recognition of the consequences that naturally flow from the fact that top hat plans are exempt from the writing requirement. The Court did no more than confirm that existing, recognized precedent applied on the facts of this case.

Finally, Petitioner makes the unwarranted assertion (Petition, p. 5) that "The record established . . . that all claimants were aware of the Plans' reservation-of-rights clause . . . ". This may, or may not, prove to be true upon a full evidentiary hearing; but there is nothing in the present record that would justify this statement, nor did the Third Circuit make this finding.

REASONS FOR DENYING THE WRIT

This Court should deny New Valley's Petition for a Writ of Certiorari. The Petitioner's argument, that there are conflicts among the Circuits which need to be resolved by this Court, is not justified by a close and

careful reading and analysis of the cases. Respondent agrees with Petitioner's position, to wit, that there is a need for uniformity in the construction, interpretation and enforcement of employee benefit plans governed by ERISA; but does not believe that the opinion below violates that principle.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO THE INTERPRETATION OF TOP HAT PLANS.

"Top hat plans" are *sui generis,* neither employee welfare benefit plans nor employee pension benefit plans. They constitute a separate category of deferred compensation plan that happens to be governed by some, but not all, of the requirements of ERISA. *Carr v. First Nationwide Bank,* 816 F.Supp. 1476, 1488-89 (N.D. Cal. 1993); *Barrowclough v. Kidder, Peabody & Co., Inc.,* 752 F.2d 923 (3d Cir. 1985).

One of the unique characteristics of top hat plans is their exemption from 29 USC 1102(a)(1), which would otherwise require that such plans, like pension and welfare benefit plans, be entirely written. Since they need not be written at all, oral terms can be part of a top hat plan unless the parties have by specific agreement excluded them.

Petitioner argues that reservation-of-rights clauses, such as this plan contained, preclude the use of extrinsic evidence to find ambiguities in the meaning of the plan, which ambiguities then require parole evidence to resolve. It further argues that some Circuits properly recognize and apply this rule, while others do not.

However, a close and careful reading of the various cases cited by Petitioner, along with other relevant cases, shows that the Circuits at this time are consistent in their approach to top hat plans, such as the plan which is at issue in this action. All of the cases cited by Petitioner in support of its position involve welfare benefit plans. The conflicts in these cases described by Petitioner are apparent, rather than real, and stem from the improper comparison of decisions relating to employee welfare benefit plans and employee pension plans with those arising from top hat plans. It is well established that welfare benefit plans are confined to their specific written terms including clauses reserving to the plan's sponsor the right to terminate the plans. See *Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560 (7th Cir. 1995), *Gable v. Sweetheart Cup Co.*, 35 F.3d 851 (4th Cir. 1994), cert. denied, 115 S.Ct. 1442 (1995), *Alday v. Container Corp.*, 906 F.2d 660, 666 (11th Cir. 1990), cert. denied, 498 U.S. 1026 (1991), *Schoonejongen v. Curtis Wright*, 18 F.3d 1034 (3d Cir. 1994) rev'd and remanded on other grounds, 115 S.Ct. 1223 (1995), *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488 (2d Cir. 1988). The only case cited by Petitioner on this point which did not specifically concern a welfare benefit plan is *Smart v. Gillette Co. Long Term Disability Plan*, 70 F.3d 173 (1st Cir. 1995). That case involved the settlement of a claim and potential litigation for long-term disability benefits and worker's compensation by the Petitioner. The ERISA considerations in the opinion were incidental, at best, and by no stretch could the plans and benefits at issue there be deemed top hat plans.

Petitioner has pointed to the opinion of the Department of Labor, DOL Op. 90-14A in support of its argument that a "right to terminate" clause in a top hat plan should be strictly construed. However, the opinion in *Carr* dealt both with that argument, and the underlying agency opinion, as follows:

> However, the Department of Labor's opinion does not bolster defendants' arguments, but rather, undermines them. To the extent that Congress relied on Top Hat participants' power to influence the contents of their plans in denying them the substantive protections of ERISA, it would be absurd to deny such individuals the ability to enforce the terms of their plans in contract. If defendants' position were correct, it would be difficult to imagine what Top Hat participants would have the power to obtain "through negotiation or otherwise" – apparently, not much more than illusory promises.
>
> Therefore, the court holds that notwithstanding ERISA's exemption of Top Hat plans from most of its substantive requirements, the participants in such plans may enforce the terms of their plans under the federal common law rules of unilateral contract generally applicable to pension plans, so long as the asserted unilateral contract rights are found in the terms of plan documents themselves. *Id.* at 1492.

The Third Circuit below recognized the uniqueness of top hat plans:

> The elements of this definition make the top hat category a narrow one. . . . Because of these

> limitations, top hat plans form a rare sub-species of ERISA plans. . . . Petitioner's Appendix, p. A-10.

As the holding in this case is clearly limited to top hat plans, there is no conflict with the cases cited by Petitioner.

II. THERE IS NO DIVISION AMONG THE CIRCUITS REGARDING THE USE OF EXTRINSIC EVIDENCE IN DETERMINING WHETHER AN AMBIGUITY EXISTS IN A TOP HAT PLAN.

Regardless of the Petitioner's broad claim that certain Circuits use a "four-corners" approach to the construction of plans, a careful reading of the cited cases shows that in many of these cases the Courts appear to have considered extrinsic contextual evidence in making their interpretations of the documents. This was certainly so in *Smart* where the Court's opinion dwelt at length on the history of the parties' correspondence and negotiations, as well as in *Schoonejongen* and *Murphy* where the court ruled, in part, that under the circumstances as developed at trial, there could be no other reasonable interpretation of the document other than the one that was given by the plan sponsor.

Conversely, in at least some cases cited by Petitioner as examples of loose construction of reservation-of-rights clauses, where extrinsic evidence produced unintended results, a more careful reading shows that the plan language was, in fact, carefully studied and applied. *Wulf v. Quantum Chemical Corp.*, 26 F.3d 1368 (6th Cir. 1994), cert. denied, 115 S.Ct. 667 (1994), involved the sponsor's

attempts to retroactively amend an ESOP (Employee Stock Ownership Plan, a form of defined contribution pension plan, and not a top hat plan). The Court did construe the reservation-of-rights clause strictly including that portion which provided "no amendment shall be made which has the effect of decreasing the balance of the account of any member." In no sense did the Court say that Quantum could not amend its plan, nor did it even attempt to prohibit the retroactive amendment; it simply gave effect to the plain language of the balance of the clause (quoted above) which placed a limit on the reserved rights.

Armistead v. Vernitron, 944 F.2d 1287 (6th Cir. 1991) and *Jensen v. SIPCO*, 38 F.3d 945 (8th Cir. 1994), cert. denied, 115 S.Ct. 1428 (1995), are the only cited cases in which the Courts did rely heavily on extrinsic evidence to find that reservation-of-rights clauses in welfare benefits plans were ambiguous. In both cases, the Courts held that this ambiguity precluded termination of certain retirees' benefits where those retirees had retired as a result of statements and promises made by the employer defendants. In essence, it can be said that the Court in these cases interpreted the reservation-of-rights clauses in such a way as to preclude the employer from using them to work a fraud on the employees. In any event, these two decisions were not relied upon – or even mentioned – by the Third Circuit in reaching its decision in this case.

More importantly, none of these decisions are in conflict with this decision, as they relate to welfare benefit plans, not top hat plans. Petitioner has not cited a single case involving a top hat plan where a "four corners" approach was used.

III. THE CIRCUITS ARE NOT DIVIDED ON THE USE OF FEDERAL COMMON LAW PRINCIPLES IN INTERPRETING TOP HAT PLANS.

In arguing that the Circuits are divided on the propriety of using such common law contract principles as "unilateral contract" and "illusory promise" to interpret top hat plans, Petitioner relied on several cases, which reliance does not bear scrutiny. For instance, it cites *Murphy*, 61 F.3d at 564 for the proposition that some circuits reject this approach. However, what that Court really held was:

> An estoppel claim based on a written representation can be advanced with respect to a single employer unfunded welfare benefit plan, which might be the case here, although Murphy has not made that claim. . . . But we cannot consider this theory because it was totally undeveloped both on appeal and before the District Court. *Id.* at 568.

Any language, therefore, about the use of common law principles is no more than *dicta*. Furthermore, *Murphy* involved a welfare benefit plan, not a top hat plan. Similarly, in *Fielding v. International Harvester Co.*, 815 F.2d 1254 (9th Cir. 1987) (which also involved a welfare benefit plan), while the Court held that the District Court erred in finding an illusory promise, it certainly did not hold that this issue should not have been considered. In making its determination, the Third Circuit clearly looked to the record of extrinsic evidence developed at trial, and concluded that the trial judge had misapplied the relevant law. *Reichelt v. Emhart Corp.*, 921 F.2d 425 (2d Cir. 1990), cert. denied, 501 S.Ct. 1232 (1991) was, again, a

claim arising out of a welfare benefit plan, and adhered to the generally accepted principle, not disputed by the Third Circuit in its opinion, that ERISA preempts federal common law and state law on the issue of interpreting welfare benefit plans. Finally, *De Geare v. Alpha Portland Industries, Inc.*, 652 F.Supp. 946 (E.D. Mo. 1986) aff'd 837 F.2d 812 (8th Cir. 1988), did clearly state that the court must look to extrinsic evidence in interpreting the Reservation-of-Rights clause:

> Thus, the issue is one of contract interpretation, . . . [citations omitted] and, if necessary, a consideration of the relevant extrinsic evidence and the parties course of dealing. *Id.* at 959.

IV. THE OPINION BELOW PROPERLY DISTINGUISHED *IN RE UNISYS CORP. RETIREE MEDICAL BENEFIT "ERISA" LITIGATION.*

In writing its opinion, the Third Circuit went to great lengths to distinguish and re-affirm its holding in *In re Unisys Corp. Retiree Medical Benefit 'ERISA' Litigation*, 58 F. 3d 896 (3d Cir. 1995), cert. denied, 116 S.Ct. 1316 (1996). The distinction, of course, rests squarely on the unique nature of top hat plans, as discussed *supra*. The Third Circuit emphasized that *Unisys* involved a welfare benefit plan, not a top hat plan. No "unique rules" have been created for top hat plans; the Court has merely clarified that which Congress intended, *i.e.*, that top hat plans – like other contracts – can have both written and oral portions, and that extrinsic and/or contextual evidence can be used to explain or interpret a written provision.

V. THE COURT DID NOT IMPROPERLY APPLY THE LAW OF THE FORUM TO THE CONSTRUCTION OF THIS PLAN.

Despite Petitioner's assertion that the Third Circuit was " . . . adhering to the forum's law of contract construction," (Petition, p. 24), there is no reference in the decision below to the common law principles of New Jersey. The Court did cite many Third Circuit decisions in support of its reasoning, but Petitioner has not shown that its approach is unique to the Third Circuit.

The cases cited by Petitioner do not support its contentions concerning the use of "law of the forum" in the least. Both *Brewer v. Lincoln National Life Ins. Co.*, 921 F.2d 150 (8th Cir. 1990), cert. denied, 501 U.S. 1238 (1991) and *McMahon v. New England Met. Life Ins. Co.*, 888 F.2d 426 (6th Cir. 1989) dealt with the applicability of 29 USC 1144(b)(2)(A), another exception to the general rules of ERISA, which specifically provides that state insurance regulations are not preempted. In both cases, the issue before the Court was whether certain clauses in welfare benefit plans were to be interpreted under state insurance regulations or ERISA. If the former applied, then, as a matter of federal law, the state law would apply. *Evans v. Safeco Life Ins. Co.*, 916 F.2d 1437 (9th Cir. 1990), also arose under § 1144(b)(2)(A). The Court ruled that state common law defining familial relationships was not an insurance regulation, and therefore, the plan's plain language controlled. *Grabois v. Jones*, 89 F.3d 97 (2d Cir. 1996), did not hold, as Petitioner claims, that ERISA's beneficiary determination rules prevailed over state law principles of the validity of a marriage. Rather, the holding was that the

facts of the case were too muddled for summary judgment to have been granted, and the case was remanded to the trial court for further proceedings including, *inter alia*, a determination of which party was truly the widow under state law.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

GEORGE J. COTZ, ESQ.

Ramsey, New Jersey
December 23, 1996